SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0130-22

SILVESTRE PALACIO DURAN, as Administrator and as Administrator Ad Prosequendum of FRANCISCA CISNERNOS PEREZ PALACIO, and SILVESTRE PALACIO DURAN, Individually,

Plaintiff-Respondent,

v.

MINA LE, M.D.,

Defendant-Appellant,

and

BERGEN REGIONAL MEDICAL CENTER, CAREPOINT HEALTH, CHRIST HOSPITAL, JERSEY CITY MEDICAL CENTER EMS, and GARDEN STATE HEALTH ASSOCIATES, LLC,

Defendants-Respondents.

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Argued March 11, 2024 – Decided June 19, 2024

Before Judges Gilson, DeAlmeida, and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2704-21.

Gary L. Riveles argued the cause for appellant (MacNeill, O'Neill, Riveles & Spitzer, LLC, attorneys; Gary L. Riveles, of counsel; Anelia Dikovytska Brown and Thomas J. Pyle, on the briefs).

Gerard A. Lucciola argued the cause for respondent Silvestre Palacio Duran (The Lucciola Law Group, PC, attorneys; Gerard A. Lucciola, on the brief).

PER CURIAM

In July 2019, defendant Dr. Mina Le, a medical doctor with a specialty in otolaryngology, treated and performed surgery on Francisca Cisnernos Perez Palacio (decedent). Decedent died on July 16, 2019. In July 2021, decedent's husband, Silvestre Palacio Duran (plaintiff), as administrator of decedent's estate and in his individual capacity, sued several defendants, including Dr. Le, alleging medical malpractice.

Dr. Le appeals from an August 5, 2022 order granting plaintiff's motion for reconsideration, reinstating plaintiff's complaint against Dr. Le, and deeming plaintiff's notice to Dr. Le timely under the Tort Claims Act (the Act), N.J.S.A. 59:1-1 to 59:12-3. The trial court reasoned that there were extraordinary circumstances justifying the late notice. We reverse because the material

undisputed facts do not establish extraordinary circumstances. We, therefore, vacate the August 5, 2022 order and remand with direction that the trial court enter an order dismissing with prejudice plaintiff's complaint against Dr. Le for failure to serve a timely notice under the Act.

I.

We discern the material facts from the record. In July 2019, Dr. Le was working for Rutgers New Jersey Medical School (Rutgers) and was practicing at the Bergen New Bridge Medical Center (the Bergen Medical Center) under an affiliation agreement between Rutgers and the Bergen Medical Center.

At that time, decedent was a forty-nine-year-old woman who spoke Spanish. She had a history of sore throats and possible sleep apnea. Her treating physician, Dr. Henry Gaspard, referred her for treatment at the Bergen Medical Center.

On July 1, 2019, Dr. Le examined decedent and recommended surgery. Dr. Le performed the surgery on July 15, 2019. The same day, decedent was discharged. Plaintiff has certified that decedent never regained full consciousness after her discharge, and decedent died on July 16, 2019.

Plaintiff retained an attorney, and, on July 8, 2021, plaintiff sued Dr. Le, the Bergen Medical Center, and four other healthcare providers. In his

complaint, plaintiff alleged causes of action for medical malpractice. The four other defendants moved for dismissal in 2021, and plaintiff agreed to those dismissals. Consequently, on this appeal, there are no issues related to those other defendants.

On August 4, 2021, shortly after Dr. Le was served with the complaint, she sent an email to plaintiff's counsel responding to a request for her medical records concerning decedent. In that email, Dr. Le stated:

> I no longer have access to any of the medical records that you are requesting, because I left my job at Bergen New Bridge Medical Center in February 2021 and therefore my access to their electronic medical record system has been inactivated.

On August 20, 2021, Dr. Le moved to transfer venue from Hudson County to Bergen County. In support of that motion, Dr. Le's counsel certified that at the time Dr. Le treated decedent, Dr. Le was an employee of Rutgers, which was a public entity. In that regard, counsel certified: "At all relevant times, Dr. Le was a Rutgers New Jersey Medical School employee. A true and accurate copy of Dr. Le's Curriculum Vitae is attached hereto as Exhibit B." (Boldface omitted). Dr. Le's curriculum vitae stated that from 2018 to 2021, Dr. Le was an "Assistant Professor of Otolaryngology-Head and Neck Surgery" at "Rutgers New Jersey Medical School, Newark, NJ."

The trial court denied the motion to transfer venue. In doing so, the trial court reasoned:

> Under Rule 4:3-2[,] actions that are brought against municipal corporations, counties, public agencies, or officials shall be venued in the county in which the cause of action arose. Here[,] according to the representations made by the plaintiff the specific treatment began . . . at . . . Bergen New Bridge Medical Center. However, after the plaintiff was discharged[,] all of the events that ultimately led to her death occurred in Hudson County.
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> Further[,] this action is brought against Dr. Le individually and is not brought against a municipal corporation, county, public agency, or official. Dr. Le is notably employed or has been employed as an assistant professor in a—as an assistant professor with a public entity. The record, however, does not reflect that she is an agent of this entity that would require a different analysis.
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> [(Citation reformatted).]

On October 4, 2021, Dr. Le filed an answer and affirmative defenses to plaintiff's complaint. In her affirmative defenses, Dr. Le represented that she had been employed by Rutgers when she treated decedent in July 2019. She asserted two separate defenses based on the Act, including that plaintiff's claims were "barred by reason of the failure to comply with the notice provisions of the . . . Act, more specifically, N.J.S.A. 59:8-1 through 8:11." (Citations reformatted).

On January 4, 2022, Dr. Le moved to dismiss plaintiff's claims for failure to file a timely notice of tort claim as required by the Act. Dr. Le also moved to dismiss the complaint based on plaintiff's failure to serve statutorily compliant affidavits of merit.[1] Approximately eight weeks later, on February 28, 2022, plaintiff filed opposition to Dr. Le's motion to dismiss and cross-moved for leave to file a late notice on Dr. Le. That filing was plaintiff's first attempt to serve Dr. Le with a notice of tort claim under the Act.

On March 28, 2022, the trial court issued an order that granted Dr. Le's motion to dismiss and denied plaintiff's cross-motion to file a late notice. The court issued a written opinion explaining its findings the following day. The court found that plaintiff had been given notice of Dr. Le's status as a public employee on August 20, 2021, and again on October 4, 2021. The court also

[1] Plaintiff submitted two affidavits of merit in fall 2021. Dr. Le challenged the affidavits on the grounds that they did not comply with New Jersey law because the affidavits did not state that the doctors who submitted them reviewed decedent's medical records. The court entered an order on May 27, 2022, finding that the affidavits were statutorily deficient. In moving for reconsideration in July 2022, plaintiff submitted certifications from the doctors in which they certified that they reviewed the decedent's medical records prior to submitting their original affidavits of merit. When the court granted reconsideration in August 2022, it found that the certifications made the affidavits substantially compliant, and it deemed the affidavits compliant nunc pro tunc. The rulings on the affidavits of merit are not part of this appeal and we have not considered those rulings.

found that plaintiff had not demonstrated extraordinary circumstances justifying a late notice because plaintiff failed to address why no notice was served within ninety days of either August 20, 2021, or October 4, 2021.

Plaintiff, thereafter, moved for reconsideration of the tort claim notice ruling three times. The first motion was denied in an order issued on May 27, 2022. The second motion was denied for failure to provide a hard copy of the motion papers. On August 5, 2022, after hearing argument, the trial court granted the third motion, explaining its reasons on the record.

In granting reconsideration, the trial court reasoned that although plaintiff was aware of Dr. Le's status as a public employee in August 2021, Dr. Le's employment and the application of the Act's notice requirement were "not squarely put before the court or plaintiff until the filing of the motion seeking to dismiss plaintiff's complaint" in January 2022.[2] In making that ruling, the trial court relied on several "unrebutted" facts set forth in the certification filed by plaintiff in support of the motion for reconsideration, as well as the email Dr. Le sent on August 4, 2021. Specifically, the court relied on the facts that (1)

[2] In its oral decision, the trial court stated that Dr. Le's motion to dismiss had been filed on "February 8, 2022." The record is clear, however, that Dr. Le filed her motion to dismiss on January 4, 2022. The difference between those dates is not material for purposes of the issues on this appeal.

plaintiff did not know Dr. Le was a public employee when decedent was treated by Dr. Le in July 2019; (2) plaintiff did not receive all the medical records until October 2021; and (3) Dr. Le's August 4, 2021 email did not state that she was a public employee, suggested that she had been employed by the Bergen Medical Center in 2019, and suggested that in 2021, she was in private practice. Relying on those facts, the court concluded that plaintiff had established extraordinary circumstances justifying a late notice under the Act.

That same day, the trial court entered an order (1) granting reconsideration; (2) vacating the court's orders dated March 28, 2022, and May 27, 2022; (3) reinstating plaintiff's complaint against Dr. Le; (4) deeming the notice timely served; and (5) deeming the affidavits of merit compliant.[3]

Dr. Le now appeals from the August 5, 2022 order. In her appeal, she challenges only the trial court's rulings on the late notice of tort claim. She has not raised any issues concerning the court's ruling on the affidavits of merit.

II.

On appeal, Dr. Le makes two arguments, contending that the trial court (1) misapplied the Act by failing to recognize that the cause of action accrued

[3] The August 5, 2022 order states it was vacating an order dated "March 27, 2022." The record reflects that the order was entered on March 28, 2022.

when plaintiff received actual notice of the Act's defense in Dr. Le's answer in October 2021; and (2) erred in finding extraordinary circumstances by considering events that took place before the accrual date and which had no bearing on plaintiff's ability to serve a notice of tort claim on Dr. Le under the Act.

A. The Act.

The Act waives the State's sovereign immunity but does so with certain requirements and limitations. See N.J.S.A. 59:1-2 (explaining that "public entities shall only be liable for their negligence within the limitations of" the Act); see also Nieves v. Off. of the Pub. Def., 241 N.J. 567, 574-75 (2020). "Generally, immunity for public entities is the rule and liability is the exception." Fluehr v. City of Cape May, 159 N.J. 532, 539 (1999). Accordingly, the Act imposes "strict requirements upon litigants seeking to file claims against public entities." McDade v. Siazon, 208 N.J. 463, 468 (2011). Rutgers, including its medical school, is a public entity protected by the Act. See D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 149 (2013) (analyzing whether the plaintiff complied with the Act's requirements in her suit against public entity defendants, including Rutgers); N.J.S.A. 59:1-3 note (explaining

that the Act's definition of "public entity" is "specifically intended to include such entities as . . . Rutgers the State University").

The Act also applies to and governs tort claims against employees of public entities. See N.J.S.A. 59:1-3; see also Nieves, 241 N.J. at 575 (explaining the liability of public employees under the Act). Our Supreme Court has repeatedly held that medical doctors, like Dr. Le, who work for a New Jersey public medical school are public employees even when they are practicing in affiliated private hospitals. Lowe v. Zarghami, 158 N.J. 606, 623 (1999); Eagan v. Boyarsky, 158 N.J. 632, 638 (1999). In Lowe and Eagan, which were decided on the same day, the Court held that physicians on the faculty at the University of Medicine and Dentistry of New Jersey were public employees entitled to notice under the Act. Lowe, 158 N.J. at 623; Eagan, 158 N.J. at 638. Indeed, plaintiff does not dispute that Dr. Le was a public employee when she treated decedent in July 2019.

A person seeking to file a claim under the Act must file a notice of tort claim on a public entity or employee "not later than the ninetieth day after accrual of the cause of action." McDade, 208 N.J. at 468 (quoting N.J.S.A. 59:8-8). The failure to serve a notice of tort claim within the statutory ninety-day period results in a bar against the claim and recovery. Id. at 476; N.J.S.A. 59:8-

8. There is, however, an exception to the ninety-day time bar. In limited circumstances, relief can be afforded under the Act if a claimant moves for leave to file a late notice "within one year after the accrual of [the] claim." McDade, 208 N.J. at 476 (quoting N.J.S.A. 59:8-9). The trial court may grant the motion if there are "'sufficient reasons constituting extraordinary circumstances' for the claimant's failure to timely file" a notice of tort claim within the statutory ninety-day period, and if "the public entity [or public employee is not] 'substantially prejudiced' thereby." Id. at 477 (quoting N.J.S.A. 59:8-9).

Determining "extraordinary circumstances" and "substantial prejudice" requires a "trial court to conduct a fact-sensitive analysis of the specific case." Id. at 478. The Legislature intended the "extraordinary circumstances" requirement to be a demanding standard. See D.D., 213 N.J. at 148 (citing Lowe, 158 N.J. at 625). When analyzing the facts, a court must determine how the evidence relates to the claimant's circumstances during the ninety-day period. Id. at 151.

Courts evaluate a notice of tort claim's timeliness using a "sequential analysis." Beauchamp v. Amedio, 164 N.J. 111, 118 (2000). First, the court must determine the date when the claim accrued. Ibid. Second, the court must determine whether a notice of tort claim was filed within ninety days of that

date. Ibid. Finally, if the notice was not timely, the court must determine whether extraordinary circumstances justify a late notice. Id. at 118-19; Bayer v. Township of Union, 414 N.J. Super. 238, 258 (App. Div. 2010).

B. The Date of Accrual.

The Act does not define the date on which a claim accrues. Ben Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123, 134 (2017). Nevertheless, our Supreme Court has held that the accrual of a claim under the Act is to be determined "in accordance with existing law in the private sector." H.C. Equities, LP v. County of Union, 247 N.J. 366, 382 (2021) (quoting Beauchamp, 164 N.J. at 116). The Court has explained:

> In general, our law in the private sector holds that a claim accrues on the date on which the underlying tortious act occurred. However, that same common law allows for delay of the legally cognizable date of accrual when the victim is unaware of his [or her] injury or does not know that a third party is liable for the injury. By operation of the discovery rule, the accrual date is tolled from the date of the tortious act or injury when the injured party either does not know of his [or her] injury or does not know that a third party is responsible for the injury.
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> [Ben Elazar, 230 N.J. at 134 (citations omitted) (citing Beauchamp, 164 N.J. at 117).]

"The test for the application of the discovery rule is 'whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he

or she was injured due to the fault of another.'" McDade, 208 N.J. at 475 (quoting Caravaggio v. D'Agostini, 166 N.J. 237, 246 (2001)). In other words, the cause of action accrues when the claimant has "two pieces of information that are the key to the discovery rule, namely an injury and 'facts suggesting that a third party may be responsible.'" Maher v. County of Mercer, 384 N.J. Super. 182, 188 (App. Div. 2006) (quoting Ayers v. Township of Jackson, 106 N.J. 557, 582 (1987)).

In cases involving medical doctors who are public employees, but who provide medical treatment at an affiliated private hospital, the court has also effectively tolled the accrual date until the plaintiff knew or should have known that the defendant was a public employee. See Lowe, 158 N.J. at 629; Eagan, 158 N.J. at 642-43; see also Ventola v. N.J. Veteran's Mem'l Home, 164 N.J. 74, 82 (2000) (allowing the plaintiffs to bring a claim against a hospital where they diligently pursued their claim but did not know the hospital was a state hospital and thus did not provide notice as required by the Act). In Lowe and Eagan, the Court granted leave to the plaintiffs to file late notices under the Act because it was unclear if the doctors were public employees. Lowe, 158 N.J. at 629-30; Eagan, 158 N.J. at 642-43. In both those cases, the Court reasoned that the notice provisions of the Act were not intended as a "trap for the unwary." Lowe,

158 N.J. at 629 (quoting Murray v. Brown, 259 N.J. Super. 360, 365 (Law Div. 1991)).

In Ventola, the Court followed the holdings and reasoning in Lowe and Eagan and held that there were extraordinary circumstances justifying a late notice of tort claim in that case because of the "understandable confusion concerning the status of the veterans' home" as a state public entity as compared to a federal entity. 164 N.J. at 82.

To avoid confusion concerning physicians' status as public employees, the Court issued the following directive in Lowe and Eagan:

> [Public medical schools] must require clinical professors employed by them to advise their patients, both orally and in writing, that they are employees of [public medical schools]. Such notice should be given to a patient as soon as practicable. It also would be helpful if the clinical professors wore badges identifying themselves as [public medical school] employees. Those steps, if taken together with this holding that clinical professors are [public medical school] employees, should make patients aware that their physicians are public employees entitled to notice under the [Act].
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> [Eagan, 158 N.J. at 643; see also Lowe, 158 N.J. at 631 (explaining the same directive).]

In Ventola, the Court observed that "if State health-care providers wish to rely on the notice provisions of the [Act], they will have [to make] their status clear to patients." 164 N.J. at 83.

The decision of whether to grant a plaintiff's motion for leave to file a late notice of tort claim under the Act is left "to the sound discretion of the trial court." D.D., 213 N.J. at 147 (quoting Lamb v. Glob. Landfill Reclaiming, 111 N.J. 134, 146 (1988)). The trial court's decision should not be disturbed "in the absence of a showing of an abuse" of discretion. Ibid. (quoting Lamb, 111 N.J. at 146); see also McDade, 208 N.J. at 476-77. "Although deference will ordinarily be given to the factual findings that undergird the trial court's decision, the court's conclusions will be overturned if they were reached under a misconception of the law." D.D., 213 N.J. at 147 (citing McDade, 208 N.J. at 473-74).

C. Applying the Law to Plaintiff's Notice.

When it first examined the issue, the trial court determined that plaintiff's causes of action accrued on August 20, 2021, when Dr. Le filed her motion to change venue and clearly stated her status as a public employee. The court also noted that Dr. Le made her status as a public employee even clearer when she filed her answer and affirmative defenses on October 4, 2021.

In granting reconsideration, the trial court reiterated that Dr. Le gave notice of her status as a public employee in August and October 2021. The court then reasoned, however, "that the issue of Dr. Le's employment and the applicability of the Tort Claims Act was not squarely put before the court or plaintiff until the filing of the motion . . . to dismiss" in January 2022.

There is substantial, credible evidence supporting the trial court's finding that plaintiff's causes of action against Dr. Le accrued on August 20, 2021. The relevant inquiry under the law is whether plaintiff knew or should have known of Dr. Le's status as a public employee. Dr. Le's unequivocal statement in support of her motion to transfer venue made it clear that she was a public employee, and plaintiff was on notice that he should inquire into Dr. Le's employment status as of August 20, 2021.

We hold that the trial court abused its discretion when it reconsidered the extraordinary circumstances issue. The legal standard is not whether the public employee "squarely put" the applicability of the Act before the court or plaintiff. Instead, the legally relevant inquiry is when Dr. Le disclosed that she was a public employee. The material undisputed facts in this record establish that Dr. Le made that disclosure on August 20, 2021. She also unequivocally disclosed

that she was a public employee subject to the Act's immunities and defenses when she filed her answer and affirmative defenses on October 4, 2021.

In determining whether there are extraordinary circumstances allowing a late notice, the court must examine the evidence related to the claimant's circumstances during the ninety-day period. Id. at 151. Here, the relevant time period was the ninety days after August 20, 2021. It is undisputed that plaintiff first moved for leave to file a late notice on February 28, 2022. That date was well beyond ninety days from August 20, 2021. Indeed, it was beyond ninety days from October 4, 2021. Plaintiff has submitted no facts supporting a finding of extraordinary circumstances during the relevant ninety-day time frame.

Instead, in moving for reconsideration, plaintiff filed a certification relying on circumstances before August 20, 2021. Specifically, plaintiff certified that (1) neither he nor decedent knew Dr. Le was a public employee when decedent was treated by Dr. Le in July 2019; (2) he did not receive all of decedent's medical records until October 2021; and (3) he was confused by Dr. Le's August 4, 2021 email. In granting reconsideration, the trial court relied on those facts in determining that there were extraordinary circumstances justifying a late notice under the Act.

The facts relied on by plaintiff and the trial court in reconsideration, however, were not relevant facts and do not as a matter of law establish extraordinary circumstances in this case. On August 20, 2021, plaintiff knew or should have known that Dr. Le was a public employee when she treated decedent because Dr. Le made that representation in a court filing. Plaintiff argues that the court's ruling on the motion to transfer confused the issue. We reject that argument. Any comments the court made in denying the motion to transfer related to the issue of transferring venue. The court clearly acknowledged that Dr. Le was representing that she was a public employee. Moreover, any confusion was further clarified on October 4, 2021, when Dr. Le asserted affirmative defenses based expressly on the failure to file a timely notice of tort claim. Plaintiff took no action in the following ninety days, and there are no facts on which to find extraordinary circumstances justifying a late notice beyond ninety days from October 4, 2021.

When plaintiff received all the medical records is also not relevant to the extraordinary circumstances analysis. Plaintiff clearly knew that Dr. Le had been the treating physician and had knowledge of the alleged medical malpractice. Plaintiff did not need the medical records to establish that Dr. Le was a public employee. Instead, Dr. Le made that position clear in her filing on

August 20, 2021. Furthermore, plaintiff received all the medical records in October 2021, which gave him and his attorney ample time to serve a timely notice.

Finally, Dr. Le's August 4, 2021 email does not constitute extraordinary circumstances. To the extent there was any confusion, Dr. Le's subsequent filings on August 20, 2021 and October 4, 2021 clarified that she was a public employee at the time that she treated decedent in 2019.

In summary, the relevant dates for determining extraordinary circumstances are: (1) decedent's surgery on July 15, 2019; (2) decedent's death on July 16, 2019; (3) Dr. Le's clear statement on August 20, 2021 that she was a public employee when she treated decedent; and (4) plaintiff's first motion to file a late notice on Dr. Le on February 28, 2022. Because there was no showing of extraordinary circumstances between August 20, 2021 and February 28, 2022, plaintiff was not entitled to file a late notice, and Dr. Le was entitled to dismissal of the claims against her with prejudice under the Act. Consequently, we vacate the August 5, 2022 order and remand with direction that the trial court enter an order dismissing with prejudice plaintiff's complaint against Dr. Le for failure to serve a timely notice under the Act.

Reversed, vacated, and remanded consistent with the directives in this opinion. We do not retain jurisdiction.